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Ling Peek Hoe & Anor v Ding Siew Ching and another appeal

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)–23–04 OF 2016 (A) AND 02(f)–24–04 OF 2016 (A)
RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABU SAMAH, RAMLY ALI AND ZAHARAH IBRAHIM FCJJ
20 JUNE 2017

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Evidence — Standard of proof — Fraud — Plaintiff in civil case alleged fraud and conspiracy to defraud on part of defendants — Trial court held there was an 'irresistible conclusion' plaintiffs had proven their case — Court of Appeal set aside D *trial court's decision and ruled that 'beyond reasonable doubt' test should have been used to determine whether fraud had been proven and that use of 'balance of probabilities' test or 'irresistible conclusion' test wrong — Whether 'irresistible conclusion' test same as 'beyond reasonable doubt' test — Whether fraud in civil case only required to be proven on balance of probabilities — Whether since trial* E *judge found that plaintiffs succeeded on higher standard of proof they would have naturally succeeded if lower standard of 'balance of probabilities' had been applied*

The first appellant ('A1') in these appeals owned three properties ('the three properties'). The second appellant was A1's son. The respondent, Ding Siew F Ching ('DSC'), was a practising lawyer whose siblings were the three respondents, Ding Toh Biew ('DTB'), Ding Toh Gien ('DTG') and Ding Toh Lei ('DTL'). The last three persons were partners of the remaining respondent, Golden Star, a licensed moneylender. A1, who had earlier charged the three properties and his house to a bank ('HLBB') as security for a loan, approached G Golden Star for more loans. In return for those loans, he was asked to sign several documents and surrender the original copy of the title documents to the three properties to Golden Star for its safe-keeping until the loans were fully repaid. When he fell into arrears of his HLBB loan repayments, A1 settled part of the amount outstanding by selling his house. The respondents, meanwhile, H fully settled A1's loan with HLBB, discharged the charges on the three properties and transferred them into the names of DTB, DTG and DTL. The entire transaction was handled by DSC. The appellants sued all the respondents for, inter alia, a declaration that the transfers of the three properties were null and void based on misrepresentation, fraud and conspiracy to I defraud. A1 maintained, inter alia, that he was misled into believing that he was only signing loan documents with Golden Star, when in fact they were transfer documents, and that Golden Star had the right to have custody of the original documents of title to the three properties. A1 contended that the three properties were redeemed and transferred into the names of the respondents

concerned without his knowledge and consent. Following a full trial, the High Court decided in favour of the appellants, declared the transfers of the three properties null and void and ordered the respondents to pay the appellants damages. The High Court ruled that there was an 'irresistible conclusion' that A1 had proven his case against the respondents. The Court of Appeal ('the COA') allowed the respondent's appeals and set aside the High Court's decision ruling, inter alia, that the trial court had applied the wrong standard of proof to determine the allegations of fraudulent misrepresentation and fraud; that instead of using the 'beyond reasonable doubt' test, the trial court had used the 'balance of probabilities' test and the 'irresistible conclusion' test. The COA held that the appellants would have failed to prove their case if the 'beyond reasonable doubt' test had been used. The Federal Court granted the appellants leave to appeal on the questions: (a) whether the COA was right to adopt the standard of proof of 'beyond reasonable doubt' in the instant case; and (b) whether the 'irresistible conclusion' test was the same as the 'beyond reasonable doubt' test. In *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 ('Sinnaiyah'), the Federal Court declared that the standard of proof for fraud in a civil claim was on 'balance of probabilities' and not 'beyond reasonable doubt', however serious the allegation of fraud was. In *Sinnaiyah*, the Federal Court made it clear that that judgment only applied to the appeal before it and to 'future cases' and could not be used to set aside or review past decisions involving fraud in civil claims. The respondents in the instant appeal sought to argue that 'future cases' referred to cases that had yet to be filed in the courts and that, accordingly, the decision in *Sinnaiyah* did not affect the instant case which was already undergoing the appeal process when *Sinnaiyah* was decided.

Held, allowing the appeal, setting aside the decision of the COA and reinstating the decision of the High Court:

(1) The 'irresistible conclusion' test was the same as the 'beyond reasonable doubt' test. The trial judge came to the 'irresistible conclusion' that A1 had succeeded in proving his case on the allegations of misrepresentation, fraud or conspiracy to defraud. In other words, the trial judge relied on a much higher test (since the 'irresistible conclusion' test was the same as the 'beyond reasonable doubt' test) for the appellants to prove their case and he found that they had done so when, in law, the appellants were only required to prove their case on balance of probabilities. Since even on the higher test the trial judge found for the appellants, it was therefore obvious that had the trial judge applied the lower standard, ie, on the balance of probabilities, he would have definitely ruled that the appellants had proven their case (see paras 32 & 34–35).

(2) The Court of Appeal had premised its decision mainly on the erroneous use of the phrase or words used by the trial judge to describe the test he relied upon to find for the appellants. There was hardly any discussion on

A the quality and sufficiency of the evidence adduced by the appellants to prove their case. Neither was there any finding on whether the respondents had rebutted the evidence adduced so as to justify the dismissal of the assertions by the appellants of misrepresentation, fraud or conspiracy to defraud on the part of the respondents (see para 36).

B (3) The court could not subscribe to the argument that 'future cases' meant only cases that were yet to be filed with the courts. The law as declared by the Federal Court in *Sinnaiyah*, and made subject to the doctrine of prospective overruling, applied to all pending cases and all those cases C that were still under appeals within the court system. For that reason, it was wrong of the Court of Appeal to have adopted 'beyond reasonable doubt' as the standard of proof in the instant case (see paras 6 & 30–31).

[Bahasa Malaysia summary

D Perayu pertama ('A1') dalam rayuan-rayuan ini memiliki tiga hartanah ('ketiga-tiga hartanah'). Perayu kedua adalah anak lelaki A1. Responden, Ding Siew Ching ('DSC'), adalah peguam yang adik-beradiknya adalah ketiga-tiga responden, Ding Toh Biew ('DTB'), Ding Toh Gien ('DTG') dan Ding Toh Lei ('DTL'). Tiga orang terakhir adalah rakan kongsi responden yang E selebihnya, Golden Star, pemberi pinjaman wang berlesen. A1, yang telah pada sebelumnya mencaj ketiga-tiga hartanah dan rumahnya kepada bank ('HLBB') sebagai jaminan untuk pinjaman, mendekati Golden Star untuk pinjaman yang lebih. Sebagai balasan bagi pinjaman tersebut, dia disuruh untuk menandatangani beberapa dokumen dan menyerahkan salinan asal dokumen F hakmilik kepada ketiga-tiga hartanah kepada Golden Star untuk perlindungannya sehingga pinjaman tersebut dibayar balik sepenuhnya. Apabila dia tertunggak pembayaran balik pinjaman HLBBnya, A1 menyelesaikan sebahagian jumlah yang belum dibayar dengan menjual rumahnya. Responden-responden, sementara itu, telah menyelesaikan G sepenuhnya pinjaman A1 dengan HLBB, melepaskan caj-caj ke atas ketiga-tiga hartanah tersebut dan memindahkan mereka ke dalam nama DTB, DTG and DTL. Keseluruhan transaksi tersebut ditangani oleh DSC. Perayu-perayu menyaman kesemua responden untuk, antara lain, perisytiharan bahawa pemindahan ketiga-tiga hartanah tersebut adalah tak sah dan batal berdasarkan H misrepresentasi, fraud dan konspirasi untuk menipu. A1 mengekalkan, antara lain, bahawa dia telah ditipu untuk mempercayai bahawa dia hanya menandatangani dokumen-dokumen pinjaman dengan Golden Star, tetapi sebenarnya ia adalah dokumen-dokumen pemindahan, dan bahawa Golden Star mempunyai hak untuk jagaan terhadap dokumen-dokumen hakmilik asal I kepada ketiga-tiga hartanah. A1 berhujah bahawa ketiga-tiga hartanah tersebut adalah ditebus dan dipindahkan ke dalam nama-nama responden-responden berkenaan tanpa pengetahuan dan izinnya. Berikutan perbicaraan penuh, Mahkamah Tinggi memutuskan memihak perayu-perayu, mengisytiharkan pemindahan ketiga-tiga hartanah tersebut adalah tak sah dan batal dan

memerintah responden-responden untuk membayar perayu-perayu ganti rugi. Mahkamah Tinggi memutuskan bahawa terdapat 'irresistible conclusion' yang A1 telah membuktikan kesnya terhadap responden-responden. Mahkamah Rayuan ('MR') membenarkan rayuan-rayuan responden-responden dan mengenepikan keputusan Mahkamah Tinggi dengan memutuskan, antara lain, bahawa mahkamah perbicaraan telah mengguna pakai standard pembuktian yang salah untuk menentukan dakwaan-dakwaan salah nyata dan fraud; bahawa sepatutnya menggunakan ujian 'beyond reasonable doubt', mahkamah perbicaraan telah mengguna ujian 'balance of probabilities' dan ujian 'irresistible conclusion'. MR memutuskan bahawa perayu-perayu akan gagal untuk membuktikan kes mereka jika ujian 'beyond reasonable doubt' telah diguna pakai. Mahkamah Persekutuan memberikan perayu-perayu izin untuk merayu atas soalan-soalan: (a) sama ada MR adalah betul untuk mengguna standard pembuktian 'beyond reasonable doubt' dalam kes ini; dan (b) sama ada ujian 'irresistible conclusion' adalah sama seperti ujian 'beyond reasonable doubt'. Dalam kes *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 ('Sinnaiyah'), Mahkamah Persekutuan mengisytiharkan bahawa standard pembuktian untuk fraud dalam tuntutan sivil adalah atas 'balance of probabilities' dan bukan 'beyond reasonable doubt', walaupun serius tuduhan fraud tersebut. Dalam kes *Sinnaiyah*, Mahkamah Persekutuan telah membuatnya jelas bahawa penghakiman hanya diguna pakai kepada rayuan di hadapannya dan kepada 'future cases' dan tidak boleh diguna untuk mengenepikan atau menyemak semula keputusan yang lalu yang melibatkan fraud dalam tuntutan-tuntutan sivil. Responden-responden dalam rayuan ini memohon untuk berhujah bahawa 'future cases' merujuk kepada kes-kes yang belum difailkan di mahkamah dan bahawa, dengan itu, keputusan di dalam kes *Sinnaiyah* tidak menjejaskan kes ini yang mana telah menjalani proses rayuan apabila *Sinnaiyah* diputuskan.

Diputuskan, membenarkan rayuan, mengenepikan keputusan MR dan mengembalikan semula keputusan Mahkamah Tinggi:

(1) Ujian 'irresistible conclusion' adalah sama seperti ujian 'beyond reasonable doubt'. Hakim bicara mencapai kepada 'irresistible conclusion' bahawa A1 telah berjaya dalam membuktikan kesnya atas tuduhan misrepresentasi, fraud atau konspirasi utnuk menipu. Dalam perkataan lain, hakim bicara bergantung ke atas ujian yang lebih tinggi (memandangkan ujian 'irresistible conclusion' adalah sama seperti ujian 'beyond reasonable doubt') untuk perayu-perayu membuktikan kes mereka dan beliau mendapati bahawa mereka telah membuatnya apabila, dari segi undang-undang, perayu-perayu hanya diperlukan untuk membuktikan kes mereka atas imbangan kebarangkalian. Walaupun atas ujian yang lebih tinggi hakim bicara memihak perayu-perayu, ia oleh itu adalah jelas bahawa sekiranya hakim bicara mengguna pakai standard yang lebih rendah, iaitu, atas imbangan

kebarangkalian, dia akan semestinya memutuskan bahawa perayu-perayu telah membuktikan kes mereka (lihat perenggan 32 & 34–35).

(2) Mahkamah Rayuan telah mendasarkan keputusannya terutamanya atas penggunaan salah frasa atau perkataan yang digunakan oleh hakim bicara untuk menjelaskan ujian yang diguna oleh beliau untuk memihak kepada perayu-perayu. Tidak terdapat apa-apa perbincangan atas kualiti dan kecukupan keterangan yang dikemukakan oleh perayu-perayu untuk membuktikan kes mereka. Juga tidak terdapat apa-apa dapatan atas sama ada responden-responden telah mematahkan keterangan yang dikemukakan untuk menjustifikasikan penolakan hujahan-hujahan oleh perayu-perayu mengenai misrepresentasi, fraud atau konspirasi untuk menipu oleh responden-responden (lihat perenggan 36).

(3) Mahkamah tidak menerima hujahan bahawa 'future cases' hanya bermaksud kes-kes yang belum difailkan dengan mahkamah-mahkamah. Undang-undang seperti yang diisytiharkan oleh Mahkamah Persekutuan di dalam kes *Sinnaiyah*, dan dibuat tertakluk kepada doktrin penolakan prospektif, mengguna pakai kepada kesemua kes-kes sedang menunggu perbicaraan dan kesemua kes yang masih di bawah rayuan-rayuan dalam sistem mahkamah. Bagi alasan tersebut, Mahkamah Rayuan adalah salah mengguna 'beyond reasonable doubt' sebagai standard pembuktian dalam kes ini (lihat perenggan 6 & 30–31).]

Notes

For cases on fraud, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3039–3042.

Cases referred to

Golak Nath v State of Punjab 1967 AIR 1643, SC (folld)
JCT Ltd v Muniandy Nadasan & Ors and another appeal [2016] 6 MLJ 635; [2016] 3 CLJ 692, CA (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
Sarwan Kumar v Madan Lal Aggrawal 2003 AIR 1475, SC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Appeal from: Civil Appeal Nos A-02–102–01 of 2013, A-02–2975–12 of 2012 and A-02(IM)-1147–05 of 2013 (Court of Appeal, Putrajaya)

Wong Chong Wah (Wong Chun Keat, Hong Chong Hang and Edmund Lim Yun with him) (Hong Chew King & Co) for the appellants in Civil Appeal Nos 02(f)-23–04 of 2016 (A) and 02(f)-24–04 of 2016 (A).

A Iruthaya Raj (Raj Selva & Co) for the respondent in Civil Appeal No 02(f)-23–04 of 2016 (A).
Joseph Yeo (M Yunus Ali and Norazali Nordin with him) (Yunus Ali & Kam) for the respondents in Civil Appeal No 02(f)-24–04 of 2016 (A).

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

PRELIMINARY

[1] For convenience, in this judgment, unless otherwise stated, the parties are referred to as they were at the High Court. The first and second appellants are referred to as the first and second plaintiffs or collectively as 'the plaintiffs'. As for the respondents, Ding Siew Ching, Golden Star, Ding Toh Biew, Ding Toh Gien and Ding Toh Lei are referred to individually as the first, second, third, fourth and fifth defendants respectively or collectively as 'the defendants'.

[2] On 18 August 2006 the plaintiffs commenced an action against the five defendants for, inter alia: (a) an order to declare that the sale and purchase agreements of three pieces of properties, and the tenancy agreements and transfers of those properties, were null and void; and (b) damages against the first defendant for failure to exercise reasonable professional care, skills and diligence (the main suit — 'Suit 203').

[3] The third, fourth and fifth defendants then filed a claim against the first plaintiff in 2008, for injunction and damages for trespass ('Suit 45').

[4] Suit 203 and Suit 45 were consolidated on 24 February 2010. Suit 203 was allowed by the learned judicial commissioner ('JC'). Hence, the sale and purchase agreement ('S&P') and transfers of the three properties were declared null and void. Suit 45 was dismissed.

[5] The defendants were aggrieved by the High Court's decision and appealed to the Court of Appeal. Upon hearing the parties and after perusing the appeal records, the defendants' appeal was allowed with costs.

[6] The appellants successfully obtained leave to appeal to this court on 28 March 2016 on the following questions ('leave questions'):

(a) whether in the light of the recent Federal Court of Malaysia's decision in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, the Court of Appeal was right in adopting beyond reasonable doubt as the standard of proof for civil claim? and

A (b) whether irresistible conclusion is not the same as beyond reasonable doubt?

[7] Appeal to this court centred against the decision of the High Court allowing Suit 203 and the consequential orders made thereon and on the dismissal of Suit 45.

BACKGROUND FACTS

[8] The first plaintiff was the registered owner of a shophouse at No 59, Taman Ilmu, Setiawan ('No 59 shophouse') and two pieces of agricultural land located at Kg Selamat ('Kg Selamat properties'). These properties will collectively be referred to as the 'three properties'. The second plaintiff is the first plaintiff's son.

[9] The first defendant is an advocate and solicitor practising in Messrs Ding & Co in Setiawan, Perak. The second defendant is a licensed money lending company while the third, fourth and fifth defendants are partners of the second defendant. The first, third, fourth and fifth defendants are siblings.

[10] In 1995, the first plaintiff obtained a loan facility of RM590,000 from Hong Leong Bank Bhd ('HLBB') and charged the three properties and his house at No 27, Jalan Raja Omar ('Jalan Raja Omar property') as securities for the loan.

[11] In mid-1996, the first plaintiff approached the second defendant's office for a loan, through the third defendant. For the purpose of the loan, the first plaintiff was asked to furnish original copy of title documents of the three properties and was informed that the second defendant had the right to keep those title documents until the first plaintiff fully paid his loans. The first plaintiff was also asked to sign a stack of documents and to pay RM150 as legal fees. The third defendant represented to the first plaintiff that those documents and the legal fees were for the loan obtained from the second defendant. The third defendant then issued a RM5,000 cheque to the first plaintiff. Interest on the loan was agreed at 4% per month. The first plaintiff took a few more loans from the second defendant.

[12] The first plaintiff was in arrears of the HLBB loan payment. Around the end of 1996, the first plaintiff sold the Jalan Raja Omar property to regularise payments of the HLBB loan. HLBB received RM330,000 as part payment of the first plaintiff's loan with HLBB.

[13] The defendants had settled the first plaintiff's HLBB loan and discharged the charges on the three properties. In 2003, the first plaintiff

discovered that the three properties had been transferred to the third, fourth and fifth defendants by virtue of some sale and purchase agreements. Documentation for all the loans and transfers was handled by the first defendant.

[14] In the same year, the first plaintiff had to borrow money from a bank to repurchase No 59 shophouse for RM330,000, the premises where the first plaintiff and his family lived. No 59 shophouse was transferred into the second plaintiff's name. Again, documentation relating to the transfer was handled by the first defendant.

[15] The plaintiffs filed a suit against all the defendants for a declaration that the sale and purchase agreements and the transfer of the three properties were null and void. In essence, the plaintiffs' case was based on misrepresentation, fraud or conspiracy to defraud.

[16] The first plaintiff maintained that:

(a) the documents he signed in 1996 were loan documents;

(b) the defendants had wrongfully settled the first plaintiff's HLBB loan and redeemed the three properties without his knowledge or consent;

(c) the defendants misrepresented and misled the first plaintiff into believing that the loan transaction had given the defendants rights to retain the original documents of title of the three properties until the loans were fully settled and to discharge charges on the three properties;

(d) the three properties were unlawfully transferred to the third, fourth and fifth defendants; and

(e) the first defendant had failed to exercise all reasonable professional care, skill and diligence and that she had breached the terms of her retainer with the first plaintiff when she failed to advise the first plaintiff properly on the documents signed by the first plaintiff (ie loan documents/sale and purchase in 1996 and the transaction to repurchase No 59 shophouse in 2003).

DECISION OF THE HIGH COURT

[17] After a full trial the learned JC found that the first plaintiff and the second defendant had money lending relationship and not that of a sale and purchase. The learned JC ruled that there was an 'irresistible conclusion' that the first plaintiff had succeeded in proving his case based on the following findings:

A (a) the first plaintiff signed the documents under an impression that they were loan documents when in fact they were sale and purchase documents;

(b) the transfers of the three properties to the third, fourth and fifth defendants were made without the knowledge and consent of the first plaintiff;

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(c) first and third efendants were in a relationship of active confidence to the first plaintiff; and

C (d) the first and third defendants imposed an undue influence on the first plaintiff causing him to sign the sale and purchase documents.

[18] The learned JC decided for the plaintiffs and declared that the transfers of the three properties were null and void. The defendants were ordered to pay the plaintiffs general, special, punitive and exemplary damages. The learned JC then ordered that the defendants' counterclaim be dismissed with costs.

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DECISION OF THE COURT OF APPEAL

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[19] The Court of Appeal allowed all the three appeals by the defendants with costs and set aside the orders of the learned JC. In its judgment delivered by Vernon Ong JCA, the Court of Appeal held that:

> [32] We have perused the appeal records and the grounds of judgment of the learned JC. We are constrained to agree with the submission of the defendants that the learned JC erred in applying the wrong standard of proof in holding that the plaintiffs had proven their case against the defendants for fraudulent misrepresentation and or fraud in impugning the title in respect of the three properties.

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> [33] Our finding is premised on the learned JC's oral decision and in his written judgment where he employed two different tests, ie, the balance of probabilities and the 'irresistible conclusion' tests, both of which are not the correct tests in proving fraudulent misrepresentation and or fraud. The learned JC ought to have used the beyond reasonable doubt test. On this ground alone, being an error of law, the appeal ought to succeed.

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> [34] Secondly, in any event, even after subjecting all the evidence by using the beyond reasonable doubt test, we are of the view that the plaintiffs have failed to prove fraudulent misrepresentation and or fraud beyond reasonable doubt.

> [35] Thirdly, we are also of the view that the learned JC had decided on an unpleaded issue, ie, undue influence that was never pleaded by the plaintiffs. The learned JC had therefore misdirected himself on the law which misdirection had occasioned a prejudice against the defendants.

I

SUBMISSIONS BEFORE THE FEDERAL COURT

[20] Learned counsel for the plaintiffs submitted that the plaintiffs instituted the main Suit 203 against the defendants based on misrepresentation, fraud and conspiracy to defraud that resulted in the three properties being unlawfully transferred to the defendants.

[21] And it was thus contended that the plaintiffs had proved their case on the balance of probabilities as required by the law expressed in the recent decision of this court in *Sinnaiyah* case. It was also argued that the Court of Appeal erred in applying the test of proof beyond reasonable doubt in this case since the principle in *Sinnaiyah* case still applies despite being ruled to have only a prospective overruling on future cases. The reason is that this case is still a live case in that its appeal process had not yet been exhausted when the *Sinnaiyah* case was decided. What then encompasses 'future cases' has led to leave question 1.

[22] Learned counsel cited to us the Court of Appeal decision in *JCT Ltd v Muniandy Nadasan & Ors and another appeal* [2016] 6 MLJ 635; [2016] 3 CLJ 692 to support his contention. In that case the Court of Appeal said this:

> [30] We are of the view that the proper standard of proof, required to be proved as stated by the apex court in the *Sinnayah* case in a civil case involving allegation of fraud is applicable to this case. This is because this case, being an on-going appeal, is therefore, still a 'live' case, as opposed to those cases which had been finally adjudicated in terms of their final appeals. To our mind, that was what the apex court had meant when it said that the ruling did not have a retrospective effect. It does not apply to cases that had been finally decided. It is our considered view that all cases pending disposal in the appeal courts would qualify as 'future' cases referred to in the *Sinnayah* case because it would be incongruous indeed for the appeal courts to apply a wrong law in deciding those cases which final fate have not yet been finally determined. All cases which are pending disposal of their appeals, are therefore included in the so-called 'future cases' in the *Sinnayah* case ...

[23] For the reason above learned counsel for the plaintiffs submitted that the answer to question 1 should be in the negative.

[24] Now, at times an apex court within the judicial system of a country does enunciate a principle of law in one case before it that may seem to overrule an existing principle that has been applied to earlier cases. However, in coming up with such a principle the court would pronounce that such principle would only apply to future cases, that is, it would have a prospective overruling effect.

[25] The rationale of the principle of prospective overruling was clarified by the Indian Supreme Court in the case of *Sarwan Kumar v Madan Lal Aggrawal*

A 2003 AIR 1475 (SC) at p 1481 in these words:

> 13 ... Under the doctrine of 'prospective overruling' the law declared by the Court applies to the cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. Invocation of doctrine of 'prospective overruling' is
B left to the discretion of the Court to mould with the justice of the cause or the matter before the Court.

[26] In an earlier case of *Golak Nath v State of Punjab* 1967 AIR 1643 (SC)
C when the doctrine of prospective overruling was first considered and applied in India, the Indian Supreme Court said this at p 1668:

> (47) Let us now consider some of the objections to this doctrine. The objections are: (1) the doctrine involved legislation by courts; (2) it would not encourage parties to prefer appeals as they would not get any benefit therefrom; (3) the declaration for
D the future would only be obiter; (4) it is not a desirable change; and (5) the doctrine of retroactivity serves as a break on courts which otherwise might be tempted to be so fascile in overruling. But in our view, these objections are not insurmountable. If a court can overrule its earlier decision — there cannot be any dispute now that the court can do so — there cannot be any valid reason why it should not restrict its
E ruling to the future and not to the past. Even if the party filing an appeal may not be benefited by it, in similar appeals which he may file after the change in the law he will have the benefit. The decision cannot be obiter for what the court in effect does is to declare the law but on the basis of another doctrine restricts its scope. Stability in the law does not mean that injustice shall be perpetuated.

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[27] We are of the view that the rationale on the applicability of the doctrine of prospective overruling as discussed by the Indian Supreme Court in the above cases is logical and sound. We have no good reason not to adopt it.

G **[28]** Thus, 'the law declared by the court applies to the cases arising in *future only* and its applicability to cases which have attained *finality* is saved because the repeal would otherwise work hardship to those who had trusted to its existence'. The emphasis is on future cases and it does not affect cases that have attained finality. In fact a similar sentiment was expressed by our then Supreme
H Court in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 when in applying the doctrine of prospective overruling justified it 'so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under the section prior to the date of our judgment in this matter would remain undisturbed and not be
I affected'.

[29] And although the word finality was not further explained in *Sarwan Kumar* we hold the view that it could only mean those cases that have already exhausted their appeal process within the court system.

[30] Accordingly, within our jurisdiction we are therefore of the view that the law as declared by this court and made subject to the doctrine of prospective overruling applies to all pending cases and all those cases still under appeals within our court system. As such we cannot subscribe to the argument that future cases should mean only those cases yet to be filed with the courts.

[31] For the above reason we are therefore inclined to answer leave question 1 in the negative.

[32] In respect of leave question 2 we are of the view that the 'irresistible conclusion' test is the same as the 'beyond reasonable doubt' test. This court had in fact already made such an observation in the case of *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306, albeit a criminal case but nevertheless relevant and applicable, when it said this at p 310:

> In our view the irresistible conclusion test only seems to place on the prosecution a higher burden of proof than in a case where it depends on direct evidence, for in fact to apply the one and only irresistible conclusion test is another way of saying that the prosecution must prove the guilt of the accused beyond reasonable doubt.

[33] Having answered the two leave questions it remains for us now to consider, bearing in mind the nature and basis of the claims of the plaintiffs, what should have been the correct outcome of Suit 203 had the courts below applied the correct test as enunciated in *Sinnayah* case.

[34] The learned JC came to 'irresistible conclusion' that the first plaintiff had succeeded in proving his case, that is, on the assertions of misrepresentation, fraud or conspiracy to defraud. In other words the learned JC relied on a much higher test (since we agree that 'irresistible conclusion' is the same as 'beyond reasonable doubt' test) for the plaintiffs to prove their case and he found them to have done so when in law the plaintiffs were only required to prove their case on the balance of probabilities.

[35] At any rate since even on the higher test the learned JC found for the first plaintiff, and hence that included the other plaintiff, to have proved their case, it is therefore obvious that had the learned JC applied the lower standard, that is, on the balance of probabilities, he would have definitely ruled that the plaintiffs had proved their case.

[36] We note that the Court of Appeal in allowing the appeals by the defendants and setting aside the judgment and orders of the learned JC premised its decision mainly on the erroneous use of the phrase or words by the learned JC to describe the test he relied upon to find for the plaintiffs. There was hardly any discussion on the quality and sufficiency of the evidence adduced by the plaintiffs to prove their case. Neither was there any finding on

whether the defendants had rebutted the evidence adduced so as to justify the dismissal of the assertions by the plaintiffs of misrepresentation, fraud or conspiracy to defraud on the part of the defendants.

[37] In the upshot we allow with costs this appeal by the plaintiffs, set aside the judgment of the Court of Appeal and restore the judgment and orders of the learned JC.

Appeal allowed, decision of Court of Appeal set aside, decision of High Court reinstated.

Reported by Ashok Kumar